No. 2546

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a corporation,

Plaintiff in Error,

vs.

M. A. HUNT and MARY A. HUNT,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

JAMES B. HOWE,
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STATEMENT OF THE CASE

This is an action for personal injuries and damage to property alleged to have resulted to defendants in error as a result of a collision between a street car owned and operated by plaintiff in error and

an automobile driven by M. A. Hunt, one of the defendants in error, in the City of Seattle. Defendants in error were the plaintiffs, and plaintiff in error the defendant, in the court below, and to avoid confusion the parties will be referred to hereafter simply as plaintiffs and defendant instead of as defendants in error and plaintiff in error.

The complaint contains two counts. The first count after alleging that plaintiffs are husband and wife and that the defendant is a Massachusetts corporation, owning and operating a double track electric street railway upon East Cherry Street in the City of Seattle alleges in substance that at about 11:00 o clock A. M. on September 23, 1913, while plaintiff, M. A. Hunt, was driving plaintiffs' automobile on 27th Avenue which intersects East Cherry Street, and when the said automobile had reached East Cherry Street, defendant and its employes negligently permitted one of its eastbound street cars to collide with said automobile, resulting in damage to the automobile for which recovery is sought. The complaint further alleges that defendant was negligent in operating its car at a dangerous and unlawful rate of speed, in failing to sound the gong of the street car, in failing to check the speed of the car as it approached the crossing, and in failing to stop the street car after the motorman

saw, or should have seen that a collision was imminent. (Record pp. 2-5)

The second count contains substantially the same allegations as the first except that in this count the plaintiffs claim damages for personal injuries alleged to have been received by plaintiff, M. A. Hunt. (Record pp. 6-11)

The answer admits that defendant owns and operates an electric street railway upon East Cherry Street, and that on September 23, 1913, plaintiff, M. A. Hunt, was driving an automobile on 27th Avenue but denies all other allegations of both counts of the complaint, and pleads as an affirmative defense to each count that whatever injuries or damages, if any, plaintiffs sustained were caused and contributed to by the careless and negligent acts of plaintiff, M. A. Hunt. (Record pp. 12-17)

The allegations of the affirmative defense are put in issue by plaintiffs' reply. (Record pp. 17-19)

The issues being made up the cause was tried before a jury on September 24, 1914. (Record p. 21) At the close of all the evidence defendant challenged the sufficiency of the evidence to sustain a verdict for plaintiffs for the reason that the evidence showed that the damages sustained by plaintiffs were caused by the negligence of plaintiff, M. A. Hunt, and asked the court to instruct the jury to return a

verdict for defendant. This motion was denied. (Record p. 25)

The cause was then submitted to the jury who on September 26, 1914, returned a verdict for plaintiffs for $500.00, and on November 2, 1914, the court entered judgment in accordance with the verdict. (Record p. 21)

Neither defendant nor plaintiffs petitioned the lower court for a new trial but on November 20, 1914, (two days after the issuance of the writ of Error; Record pp. 271-272), plaintiffs filed what they termed a request for a new trial, in which, without confessing any errors on the part of the jury or Court, they request the Court to set aside the verdict of the jury and set the case down for a new trial. (Record 258-259) When this request was heard defendant objected to the granting of a new trial unless the plaintiff would concede the trial court to be in error as to the matters set forth in defendant's Assignments of Error, which plaintiffs refused to do, and the court thereupon denied plaintiffs' so called request for a new trial. (Record pp. 260-261)

From the judgment entered in accordance with the verdict this writ of error is prosecuted. (Record pp. 264-274)

SPECIFICATIONS OF ERROR

I

The Court erred in overruling defendant's challenge to the sufficiency of the evidence to sustain a verdict for plaintiffs and request that the court instruct the jury to return a verdict for defendant. (Record pp. 25-26, 234-235)

II

The Court erred in instructing the jury as follows:

> "And when such vehicles are operated at a speed in excess of that provision within the restricted district and an injury is occasioned thereby, then the law presumes that the injury was the result of the excessive speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence." (Record pp. 243-244, 252)

III

The Court erred in instructing the jury as follows:

> "If you find that it did and the car was running to exceed twelve miles per hour then it

will be presumed in the first instance that the company was negligent if any injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed, and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof:" (Record pp. 244-245, 253)

SPECIFICATION OF ERROR NO. I

Error of the Court in Refusing to Direct a Verdict for Defendant

The record shows that East Cherry Street is a paved street running approximately east and west in the city of Seattle. 27th Avenue is a paved street running north and south and intersecting East Cherry Street at a right angle. Defendant owns and operates a double-track electric street railway upon East Cherry Street.

At about 10:40 o'clock a. m. (Record, p. 89) on September 23, 1913, the plaintiff, M. A. Hunt, was driving an automobile northerly on 27th Avenue with the intention of turning, when he reached the intersection of 27th Avenue and East Cherry Street, and proceeding westerly on East Cherry Street. (Record p. 40) Before, however, he had reached the first, or eastbound street car track, his auto was struck by an eastbound street car approaching

from the west. For the apparent purpose of avoiding the car, Mr. Hunt, before reaching the track, turned his automobile to the left, and in the direction of the approaching car. (Record p. 35) Hunt insisted that the automobile came to a stop before the collision (Record, p. 35) and two of his witnesses testified to the same effect (Record, pp. 111, 124), but according to the witnesses for defendant the automobile did not come to a stop before the impact. (Record, pp. 169, 183, 188) The fender admittedly did not strike the automobile, but the automobile first came in contact with the street car at a point back of the fender on the right hand side of the car. (Record, pp. 41, 112, 138, 168, 183, 209, 226)

The principal reason advanced by Mr. Hunt for failing to see the street car in time to avoid a collision was the undisputed fact that at the southwest corner of the intersection of 27th Avenue and East Cherry Street is a large, three-story apartment house. It is important, therefore, to have in mind the relation of this building to the adjoining streets and street car tracks.

The apartment house in question has a 60-foot frontage on the west side of 27th Avenue, (Record, p. 100; Plffs' Ex. "2") and a 92-foot frontage on East Cherry Street. (Record, p. 30; Plffs' Ex. "2") The east-bound street cars are operated upon the

southerly track. From the most southerly rail of the street car track to the south curb of East Cherry Street is 16 feet, and from the curb to the apartment house it is 12 feet, making a distance of 28 feet from the most southerly rail of the street car track to the apartment house. (Record, p. 33) 27th Avenue is 60 feet wide. (Record, p. 31) On the west side of 27th Avenue the apartment house is 17½ feet from the outer edge of the curb. (Record, pp. 31-32) The paved portion is 25 feet wide. (Record, p. 31) Both 27th Avenue and East Cherry Street are paved at the point of the accident. (Record, p. 231) At its intersection with 27th Avenue, East Cherry Street is practically level. (Record, pp. 64, 170) There was no obstruction on the sidewalk north of the apartment house that would interfere with ordinary view to the west except the telephone poles. (Record, p. 33) At the time of the accident the streets were dry. (Record, p. 89)

Mr. Hunt was driving a six-cylinder Hudson automobile weighing 3980 pounds, and 15½ feet in length. (Record, p. 42) A Mr. Bevington, one of plaintiffs' attorneys in the court below, (Record, p. 1) and who also has presented a claim against the defendant growing out of this same accident (Record, p. 139) was seated in the automobile in the front seat to the left of Mr. Hunt. (Record, pp. 37, 121) it was conceded by Mr. Hunt and his

witnesses that before the automobile reached East Cherry Street it was going between 15 and 22 miles an hour. (Record, pp. 39, 94, 108) Mr. Hunt knew that street cars were operated on East Cherry Street. (Record, p. 88)

When the automobile entered Cherry Street Mr. Hunt testified he had slowed down his automobile to 8 miles an hour, (Record, p. 40) and other witnesses called by him testified substantially to the same effect. (Record, pp. 95, 116, 122) Defendant's witnesses, however, placed the speed of the automobile as it entered East Cherry Street much higher than this. The motorman testified that when he saw the auto it was about 30 feet from the south curb on East Cherry Street and was going "between 25 and 30 miles an hour." Record, p. 167) Mr. Ellis, a passenger, fixed the speed of the auto at this time at "faster than the street car" (Record, p. 188) and that of the street car at 12 miles an hour. (Record, p. 194) Mr. Holloway testified the automobile at this time was going between 10 and 15 miles an hour. (Record, p. 201) Mr. Atkinson, who was in the automobile business and selling the Hudson car, testified he had examined the marks left by the wheels of the automobile as it entered East Cherry Street; that the wheels had slid from 12 to 15 feet, and that to make these marks the

auto must have been going 25 miles an hour. (Record, pp. 212-213)

As it entered East Cherry Street the left wheel of the automobile was just off the center of the street. (Record, pp. 66-67) Since 27th Avenue is 60 feet wide (Record, p. 31) the automobile must at that time have been about 30 feet east of the west line of 27th Avenue and the apartment house.

Plaintiffs' witnesses placed the speed of the street car as it approached 27th Avenue at 30 miles an hour. (Record, pp. 40, 95, 119, 125) The defendant's witnesses fixed the speed at from 12 to 15 miles an hour. (Record, pp. 170, 182, 194, 201-202, 208)

Plaintiffs' witnesses testified that the gong of the car was not sounded until about the time of the collision (Record, pp. 87, 114, 129) while the defendant's witnesses insisted that the motorman sounded his rotary gong from the time he reached the west end of the apartment house (Record, pp. 180, 184, 201) 92 feet west of 27th Avenue. (Record, p. 30) But whether the gong was sounded or not is unimportant in view of the testimony of Mr. Hunt that he looked for the car, and must have seen it coming as soon as he passed the apartment house.

Mr. Hunt testified that when he came out on Cherry Street he looked for a car "as quick as he

could see." (Record, p. 66) Mr. Bevington testified on behalf of plaintiffs to the same effect. (Record, p. 133) However, Mr. Hunt and Mr. Bevington insisted that they did not see the street car approaching from the west as soon as they passed the apartment house because of a covered delivery wagon (Record, pp. 39, 123) standing somewhere between the main entrance and back entrance of the apartment house, (Record, pp. 42, 123) which they claim was standing so that they were looking at the front end of the wagon, which was about 4½ or 5 feet wide. (Record, p. 142) The rear entrance is at the west side and the main entrance is at the middle of the apartment house on East Cherry Street. (Plffs' Ex. "2") Since the apartment house has a 92-foot frontage on East Cherry Street (Record, p. 30) the main entrance must be about 46 feet and the rear entrance 92 feet west of 27th Avenue. The delivery wagon must, therefore, have been between 50 and 90 feet west of East Cherry Street. While other witnesses for the plaintiffs testified as to the presence of this delivery wagon between the main entrance and the west end of the apartment house (Record, pp. 97, 110), defendant's witnesses testified that they did not see a delivery wagon in front of the apartment house. (Record, pp. 177, 184, 202) On the contrary the motorman upon the approaching car testified that he saw the

automobile when it was about 30 feet from the curb on East Cherry Street (Record, p. 167), and that there was practically nothing on the street, and everything was clear. (Record, p. 177) Mr. Boehn, a passenger on the car, saw the auto when "it was coming north on 27th" and he "didn't see anything to prevent the man in the auto from seeing the street car," or "anything that was obstructing his vision." (Record, p. 183) Mr. Ellis, another passenger standing on the rear of the car (Record, p. 187), testified that "the automobile was about 30 feet from East Cherry Street" when he first saw it; and that there was nothing he saw to prevent the driver of the automobile seeing the car at that time; that he could see the automobile plainly. (Record, p. 188) Still another passenger, a Mr. Holloway, testified that he saw the automobile when it was between 25 and 30 feet from East Cherry Street, (Record, pp. 203, 204) and that there was nothing in the street to prevent the driver of the automobile from seeing the street car. (Record, p. 202)

The testimony of two interested witnesses that an ordinary delivery wagon fronting towards the observers, standing at least 80 feet away should totally obstruct the view of a large street car 46 feet long (Record, p. 36) must, we submit, be viewed with grave suspicion, especially where it is squarely

contradicted by at least three wholly disinterested witnesses who testified positively that there was nothing to obstruct the view of Mr. Hunt after he passed, and even before he reached, the north side of the apartment house. Moreover, as we shall see later, according to Hunt's own testimony the car must have already passed this delivery wagon, if it existed, before Hunt passed the apartment house.

With respect to the distance of the street car when the automobile reached East Cherry Street—defendant's witnesses without exception place it not over 60 feet from the point of collision when the automobile passed the apartment house. The motorman testified that after the front of his car got about 10 or 15 feet from 27th Avenue the automobile came in view (Record, p. 178) about 30 feet from the curb running between 25 or 30 miles an hour. (Record, p. 167) L. J. Ellis, a passenger, testified that the street car was about 30 feet from the corner when he saw the automobile (Record, p. 191) about 30 feet from East Cherry Street. (Record, p. 188) C. A. Holloway, another passenger, testified that when the street car was 30 feet west of 27th, Mr. Hunt was between 25 and 30 feet south of East Cherry Street on 27th Avenue. (Record, p. 203)

While Mr. Hunt's and Mr. Bevington's general estimate of the distance of the car when they first saw it, is in apparent conflict with this testimony, the testimony of both Hunt and Bevington taken as a whole shows that the car must have at least passed the entrance to the apartment house when the automobile reached East Cherry Street. Mr. Hunt testified that when he first saw the street car he was at point "A" on Plaintiffs' Exhibit "2" and "on a line with the curb," and that the front end of his automobile would be 9 feet ahead of that (Record, p. 36) or about 8 feet from the track (Record, p. 69), and that the street car was then 150 to 180 feet away. (Record, p. 69)

Mr. Bevington estimates that it was then "a little beyond the west end of the apartment house" (Record, p. 123) or from 100 to 175 feet away. (Record, pp. 136-137)

Not only did this testimony fail to square with that of defendant's witnesses but it is out of harmony with the other witnesses produced by the plaintiffs who apparently had no interest in the action. Thus C. L. Malvurn testified for plaintiffs that when he first saw the automobile it was 80 feet south of East Cherry Street and had not yet reached the south side of the apartment house; (Record, p. 100) that he saw the automobile and the street car at about the same time and that

when he first saw the street car it was somewhere between the point "D" (on Plaintiffs' Exhibit "2") and the west corner of the apartment house (Record, p. 94) which, as we have pointed out is 92 feet west of 27th Avenue. (Record, p. 30) He further testified that both the street car and the automobile reached "C," the point of collision, at about the same time. (Record, p. 96) The street car, he said, was going about 30 miles an hour. (Record, p. 95) According to this testimony, then, the street car was not to exceed 180 feet from the point of collision when the automobile was 80 feet from East Cherry Street, and 28 feet more (Record, p. 33) from the first rail, or 108 feet in all from the point of collision, and they both got there about the same time. It follows that when the automobile had gotten within 25 feet of the track, or more than three-quarters of the distance to the point of collision, the street car must have gone three-quarters of the distance it had to travel, or three-quarters of 180, which would be not to exceed 45 feet from the point of collision. If the automobile was nearer than 25 feet when Mr. Hunt first saw the car then the street car, at that time, must have been a corresponding distance nearer the point of collision.

The testimony of Mr. Smith on behalf of plaintiffs, is also in conflict with that of Mr. Hunt and Mr. Bevington for he says that when the automobile

was 8 feet from the track the street car was about opposite the entrance of the apartment house. (Record, p. 115) This would be about 45 feet south of East Cherry Street and 30 feet more, or half the width of 27th Avenue (60 feet; Record, p. 31), or 75 feet south of Mr. Hunt.

But not only is the testimony of Hunt and Bevington as to the distance of the car out of harmony with the testimony of plaintiffs' other witnesses and those of defendant, but it is wholly inconsistent with other testimony given by themselves. Plaintiffs' witnesses, without a dissenting voice, stated that the street car and automobile reached the point of collision about the same time. (Test. of Malvurn, Record, p. 96; Test of Smith, Record, p. 120; Test. of Bevington, Record, p. 123) Mr. Hunt, himself, testified that "the street car was very close" when he got the auto stopped. (Record, p. 74) According to Hunt and Bevington the front of the automobile was not more than 8 or 10 feet from the track when they first saw the street car (Record, pp. 69-70, 122, 136) and the automobile did not go more than 12 feet, according to Bevington, from the time they first saw the street car until the collision. (Record, pp. 136-137) At that time, according to all the plaintiffs' evidence the automobile was going 8 or 10 miles an hour (Record, pp. 40, 95, 116, 122, 132, 136) and the street car 30 miles an hour. (Record,

pp. 40, 95, 119, 125) It is apparent that while an automobile is going 12 feet at 8 or 10 miles an hour a street car would not go more than four times as far, or 48 feet at 30 miles an hour. Making due allowance for the fact that the automobile was slowing up, it is apparent that the street car according to the testimony could not have been more than 50 feet from the point of collision when Hunt and Bevington claim they first saw the car.

> "If a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf."
>
> *Atlanta R. etc. Co. v. Owens,* 119 Ga. 833, 47 S. E. 213.
>
> *Western etc. R. Co. v. Evans,* 96 Ga. 481, 23 S. E. 494.

> "There can be no doubt of the rule that where proof, as well as pleading, is of a doubtful or equivocal character, it must be construed least favorably to the party offering it."
>
> 2 Moore on Facts, Sec. 1261, p. 1402.

We submit that the street car must have been much nearer than the distance estimated by Mr.

Hunt when the automobile was but 8 feet from the track.

Collins v. Ry. Co., 218 Mass. ...., 105 N. E. 639;

Johnson v. Wash. Water Power Co., 73 Wash. 616, 132 Pac. 392.

In the case last cited, which involves a collision between a street car and wagon, the court said:

> "The distance the appellant traveled from the time he observed the car until he was struck by it is shown definitely. It is also shown with approximate correctness the rate of speed at which he was traveling. Taking this as a basis, *it is clear that the car was much nearer the appellant, when he entered the street and when he looked the second time, than he estimated it to be.*"

The most southerly rail of the street car track is 28 feet north of the apartment house (Record, p. 33) and the street car extended 1½ feet beyond the rail. (Record, p. 129) The zone of danger would consequently be 26½ feet north of the apartment house. After Mr. Hunt, sitting not more than 9 feet back from the fender of the automobile (Record, p. 42), passed the north line of the apartment house the front end of the automobile would still have to go 17½ feet before reaching the danger zone. The street car, even, if going 30 miles an hour, could not have been more than 4 times

that distance from the point of collision. If it was as much as 75 feet away it had already passed the main entrance to the apartment house and the delivery wagon referred to by Hunt and his witnesses.

Plaintiffs' claim that Hunt's view of the car could have been shut off by a delivery wagon 80 feet away is too improbable to be treated seriously, and must, we submit, be wholly disregarded when it is borne in mind that several disinterested witnesses upon the car saw the automobile before it reached East Cherry Street and that all the testimony, including that of Hunt and Bevington, shows that the car must already have passed the wagon if there was one.

Both Hunt and Bevington testified that they looked to the west as soon as they could. Since they looked, and there was nothing to obstruct their vision, they must have seen the approaching street car which was in plain sight, for the motorman and passengers on the street car saw the automobile before it reached East Cherry Street. (Record, pp. 167, 178, 188, 201)

> "There is a natural presumption that a person with good eyesight saw, or could have seen, what others in no more favorable position for observation unquestionably saw."
>
> 1 Moore on Facts, Sec. 281, page 296.
>
> *St. Louis & S. F. R. Co. v. Cundieff,* (C. C. A.) 171 Fed. 319, 325.

In the case last cited the court said:

> "With nothing whatever to obstruct his view or hearing, his statement that he stopped and looked seems to us contrary to all reasonable probability and in direct opposition to the physical facts as disclosed by the record."

If Mr. Hunt saw the street car when the front of his automobile was still 17½ feet from the car track it is an undisputed fact that he had plenty of time in which to stop his automobile. Hunt testified that when he entered East Cherry Street he was not going to exceed 8 miles an hour. (Record, p. 40) He also testified that he could stop his automobile going 8 miles an hour in 12 feet without skidding. (Record, p. 65) Robert Atkinson, who was in the automobile business and selling the Hudson car (Record, p. 212) testified that an automobile going eight miles an hour could be stopped in 4 or 5 feet if the brakes were working properly (Record, p. 213) and Mr. Hunt admitted that his brakes were all right. (Record, p. 65) We must conclude that if Mr. Hunt looked, as he says he did, as soon as he passed the apartment house, he must have seen the car, and according to the undisputed testimony he had plenty of time to stop his automobile before reaching the danger zone 18 inches south of the first rail. (Record, p. 129) He was therefore guilty of contributory negligence as

a matter of law in failing to stop his automobile in time to avoid a collision.

If, on the other hand, the driver of the automobile did not look as soon as he had a clear vision of the street to the south, or if he was going at such a speed when he passed the obstruction to his vision that he could not stop before reaching the track in case of a car being dangerously near, we submit that reasonable minds could not differ as to his contributory negligence, and that plaintiffs were not entitled to recover.

Subdivision 19, of Section 2, Ordinance No. 24597 of the City of Seattle (Defendant's Exhibit "B") provides:

> "The following vehicles, in order named, shall have the right of way in the use of all streets and public places, viz: apparatus of the Fire Department, Police Patrol Wagons, Ambulances, responding to emergency calls, emergency repair wagons of the street railway companies, and U. S. Mail wagons."

Subdivision 22, of the same section and ordinance provides:

> "Excepting as provided in Rule 19, *street railway cars shall be entitled to the track,* and in all cases where any team, automobile or other vehicle shall meet or be overtaken by any car upon any of the tracks of any of the street railways of the city, such team or vehicle shall give way to said car as soon as possible," etc.

Subdivision 30 of the same section and ordinance (Plaintiffs' Exhibit "1") provides:

> "No person shall carelessly, heedlessly or negligently * * * propel any automobile or motor vehicle in, through, along or over any public place so that such * * * automobile or auto vehicle shall come in collision with any other animal or vehicle, or shall strike against any person."

Under the foregoing ordinance street cars are given the right of way over other vehicles.

That this is the rule independently of statute or ordinance was decided in the case of *Denver City Tramway Co. v. Norton,* 73 C. C. A. 1, 141 Fed. 599, where the court said:

> "It is true that a street car company, operating its cars with electricity, has not the exclusive right to occupy the streets for its own tracks. But it does have a prior right, in the sense of a preferential right of way, over a street crossing as against the pedestrian, the equestrian, and the driver of a vehicle. Regard must be had to the respective motive powers of the two occupants of the street, their relation to the public, and their means of more or less easily avoiding collision at such junction. A street car propelled by electricity or steam is a ponderous machine. It can only move on two rails in a direct line. It cannot be turned to either side to avoid a collision in front. Its very construction and the principle on which it operates are intended for rapid transit. It carries the public under demand that it pro-

> ceed as rapidly as possible, having regard to the public welfare and safety. It cannot, therefore, be expected or required, every time it approaches a public crossing, to stop or check up and take observation as to the approach of vehicles, equestrians, and pedestrians before it can proceed. It has a right to proceed in the use of its tracks on the assumption that the drivers of vehicles and others approaching such crossings will take heed of the known hazards of such a place; the reasonable, usual speed at which such car runs, and the impossibility of its deflection from its single course, or of making a sudden stop."

But irrespective of city ordinance we submit that the dictates of common prudence required that Mr. Hunt, before attempting to cross East Cherry Street upon which he knew a street railway was operated, slow down his machine to such a speed that he could readily stop before reaching the track in case a street car was dangerously near. He knew that a street railway was operated on East Cherry Street. (Record, p. 88) He knew that his view to the south was obstructed by the apartment house until the front of his automobile would be but 19 feet from the track and less than 18 feet from the zone of danger. He was not in the exercise of due care, we submit, in relying solely upon the possibility of there being no street car near, or upon the ability of the motorman to stop his car in time to avoid a collision. To look, upon reaching East

Cherry Street, would be wholly ineffectual to save him if he passed the obstruction at such a speed that he would be unable to stop before reaching the track. He was driving a vehicle which he could readily control, as compared to a street car weighing many tons. As the court said in the case of *Minneapolis Street Ry. Co. v. Odegaard,* (C. C. A.) 182 Fed. 56:

> "The contention that the motorman should have seen the automobile as it was approaching with the speed complained of, and should have stopped his car or accelerated its motion so as to avoid collision, is without merit. The motorman might reasonably act on the presumption that any competent chauffeur in charge of an automobile would either stop his machine as it approached the car or turn the corner and pass along by the side of the car in the direction it was moving, or otherwise avoid plunging into it. *We may take judicial cognizance of the fact, now well known, that an automobile even when going at the rate of speed complained of in this case yields ready and quick obedience to the guiding wheel in the hands of a competent chauffeur.*
>
> "We accordingly hold that, under the state of facts disclosed by the record, the motorman had no reasonable ground to believe that the chauffeur would not stop or turn his machine before collision became inevitable, and, a fortiori, that he would recklessly drive his machine against the side of the car. No negligence is therefore inputable to him for not having seen

the approach of the automobile in time to avoid the injury."

We quote the following from the recent case of *Colborne v. Detroit United Ry.,* 177 Mich. 139, 143 N. W. 32, 35:

"This is a case of a right angle crossing, over a double track of an electric railway line. As plaintiff approached the track, he says he saw it 100 feet away. The street was clear except for the oncoming car. There was no confusion of passing conveyances, or persons, or cars running on different tracks, to perplex. *He could and should have made sure of the safety of proceeding, by looking just before entering upon the track, and at such a point that he could stop his machine if necessary in order to avoid a collision.* This rule should be as strictly applied to an automobile as to a pedestrian, and the reasons for its application are more impelling. Usually the careless pedestrian only imperils his own safety.

"In the light of common knowledge courts can well take judicial notice of the automobile, not only as a most useful and pleasing means of swiftly transporting persons and property for pleasure or business, when properly controlled and cautiously driven, but as a vehicle in its possibilities so destructive when in the hands of careless and reckless drivers as to spread over the land the maimed and dead until it has belittled the cruelties of the car of Juggernaut.

"We think the conclusions reached by the trial court, in directing a verdict for defendant,

find authority in principle in *McGee v. Railway,* 102 Mich. 107, 60 N. W. 293, 25 L. R. A. 300, 47 Am. St. Rep. 507; *Borschall v. Railway Co.,* 115 Mich. 473, 73 N. W. 551; *Hilts v. Foote,* 125 Mich. 241, 84 N. W. 139; *Merritt v. Foote,* 128 Mich, 367, 87 N. W. 262; *Measel v. Railway Co.,* 166 Mich. 688, 132 N. W. 453; *Stevenson v. Railway,* 167 Mich. 45, 132 N. W. 451; *Manos v. Railway, supra; Puffer v. Muskegon T. & L. Co.,* 139 N. W. 19; and other cases cited in these decisions."

In the case of *Clark v. N. Y. Rys. Co.,* 138 N. Y. Supp. 824, it was held that a chauffeur, driving an automobile in a city street at the rate of 10 miles per hour, so fast that he could not stop between girders in the street which obstructed his view of approaching cars and the track, with knowledge of existing conditions and the operation of a surface street railway, was guilty of negligence precluding a recovery for damages to the machine by collision with a street car. In so holding the court said:

"It was and is the duty of one having charge and operation of a vehicle upon a city street to have the same under reasonable control. That control necessarily varies in degree with the circumstances of each case and the physical conditions and hazards present, the character of the vehicle, the manner of its control, and the time necessary to bring it to a stop, if an exigency fairly to be apprehended should arise. The greater the danger, the higher degree of care required, and the more complete control of the vehicle, since the control called for is

such as may bring the vehicle to a prompt stop if occasion so requires. *Volosko v. Interurban St. R. R. Co.,* 190 N. Y. 206, 209, 82 N. E. 1090, 15 L. R. A. (N. S.) 1117. The chauffeur did not have his automobile under such control. *He admitted on the trial that he was going 10 miles an hour, so fast that he could not stop between the girders and the track, and consequently he was, in our opinion negligent.*"

In *Dey v. R. Co.,* 140 Mo. App. 461, 120 S. W. 134, the driver of a vehicle was held guilty of contributory negligence where he, knowing that street cars were running both ways with great frequency at a high rate of speed, his view of the car tracks being obstructed until he was within 25 or 30 feet of the track, drove his team toward the tracks at such a rate of speed that he was unable to check it soon enough to avert a collision with a car which was 100 feet distant when he first observed it. The court said in part:

"Now it appears that the plaintiff drove down Twentieth street with full knowledge of the fact that street cars were running both ways on Olive street with great frequency and at a high speed, his team under such a headway that it was impossible for him to check them and avert a collision therewith. Of course, it was impossible for him to see the car before coming within 25 or 30 feet of the track had he looked. Nevertheless he should have approached the track with more care, and it was incumbent upon him to listen, even if he could not see the approaching car, *or, at least, to have his team*

under such control as to avert a possible collision when he came into view of possible dangers which a reasonably prudent person would know as likely to attend the situation."

The following is quoted from the case of *Washington St. Ry. Co. v. Lacey,* 94 Va. 460, 475, 26 S. E. 834, 839:

"The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective. *He must not approach the track at such a rate of speed that when he reaches a point where he can see or hear the train it is too late to protect himself from injury.* He must exercise ordinary care in attempting to cross or in crossing the track; and care is never ordinary care unless it is proportionate to the known danger. 3 Elliot, R. R. Secs. 1164-1166; 2 Shear. & R. Neg. Secs. 476-478."

In the case of *Robinson v. R. Co.,* 99 Me. 47, 58 Atl. 57, 58, the court said:

"If, as the plaintiff contends, the bank of the cut was such that he could not have seen the approaching car—if he was deprived of the protection of one of his senses—so much the more he was bound to use the one which remained. If it was impossible, on account of the bank, to see a car, he had no right, in the exercise of ordinary prudence, to assume that it was impossible for a car to be behind the bank."

In the case of *Darwood v. Union Trac. Co.,* 189 Pa. St. 592, 42 Atl. 290, it was held that one who

drives at a trot upon an electric railway crossing without slowing up and looking for a car after obstructions preventing a view from the house line are passed cannot recover for injuries caused by a car even though it was traveling at an excessive speed without sounding its gong.

In the case of *Johnson v. Washington Water Power Co.,* 73 Wash. 616, it appeared that when the plaintiff, who was driving a wagon, reached the street upon which the street car was operated he saw a car approaching at a point which he described and which was shown by other evidence to be some 700 feet away. On seeing the car he drove directly along his course diagonally across the street until his horse was well into the street, when he looked again for the car and saw it about a block away. He did not look again until his horse had stepped over the first rail of the railway track at which time he saw the car quite near him. He then endeavored to swing his horse clear of the car but without avail. From the time the plaintiff first saw it until it reached him, the car was in plain view had he looked in that direction. The speed of the car was shown to have exceed the limit fixed by city ordinance. In holding that the plaintiff was guilty of contributory negligence barring his recovery the court said:

> "The trial judge rested his judgment on the ground that the appellant's own negligence contributed to the injury and we can see no escape from that conclusion. The distance the appellant traveled from the time he observed the car until he was struck by it is shown definitely. It is also shown with approximate correctness the rate of speed at which he was traveling. Taking this as a basis, *it is clear that the car was much nearer the appellant, when he entered the street and when he looked the second time, than he estimated it to be: and while he may have concluded that he had plenty of time to cross in front of it, he did not in fact have sufficient time, and did not verify his estimate by taking a look immediately before he entered the place of danger.* His injury was clearly, therefore, contributed to by his own negligence."

In *Bowden v. Walla Walla Valley Ry. Co.,* 79 Wash. 184, the driver of an automobile approached a crossing of the street upon which he was driving and a railroad upon which a street railway was operated, on a bright, sunny afternoon. He looked for approaching cars when 150 or 175 feet from the crossing, at which time he neither heard nor saw any car. From a point 40 to 100 feet from the crossing he could have seen a car approaching for a distance of 300 feet. He did not look again until he attempted to cross the track and was struck. In holding the driver guilty of contributory negligence the court said:

> *"The driver of an automobile, approaching such a crossing as the one in this case, must make reasonable use of his senses to guard his own safety, and the failure to do so is negligence.* Such a person cannot take a last look at one hundred and fifty to one hundred and seventy-five feet distance from the crossing. and then shut his eyes and go blindly forward. While we shall not attempt to say within what distance respondents should have looked for an approaching car before attempting the crossing, the law does require that such a look must be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. *Beeman v. Puget Sound Traction, Light & Power Co., ante* p. 137, 139 Pac. 1087, and cases there cited. Had respondent taken such precaution, this accident would not have happened."

In the case of *Stueding v. Seattle Electric Co.,* 71 Wash. 476, 128 Pac. 1058, it was held that the contributory negligence of a pedestrian struck by a street car precluded any recovery as a matter of law, notwithstanding negligence on the part of the street car company in operating its car at an excessive speed and without sounding its gong, where it appeared that he approached a street car where a car was unloading passengers and walked rapidly behind the standing car without stopping to look and was struck by the side or front end of a car passing on the other track.

In *Helliesen v. Seattle Electric Co.,* 56 Wash. 278, 105 Pac. 458, the court said:

> "Pedestrians in crossing the tracks of a street railway in the day time or in the night time, knowing, as respondent knew, that the crossing was one where cars frequently passed, must use their senses to apprise them of danger, if any; they cannot heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of an approaching car."

In the case of *Bardshar v. Seattle Electric Company,* 72 Wash. 200, 130 Pac. 101, a chauffeur whose automobile was hit by an electric car at a street crossing as he started to cross the tracks behind another electric car discharging passengers on a parallel track, was held guilty of contributory negligence precluding any recovery where he undertook to cross the track from behind the standing car where his view was obstructed without having observed the other car.

In *Brown v. P. S. E. Ry. Co.,* 76 Wash. 214, 135 Pac. 999, it was held that a driver of an automobile truck, colliding with a street car approaching from 25 to 35 miles per hour was guilty of contributory negligence as a matter of law where he collided with the car in turning out to the left to pass a moving van ahead of him which momentarily hid the approaching street car from view.

It is also important to bear in mind the fact that the ordinance of the city of Seattle limited the speed of automobiles at street crossings to eight miles per hour and the state statute to four miles per hour.

Ordinance No. 30263 of the City of Seattle (Defendant's Exhibit B) provides in part:

> "It shall be unlawful for any person to ride, drive or propel any automobile, autocycle, motorcycle or other motor vehicle, * * * to pass or cross any street, intersection or round any corner at a greater rate of speed than eight (8) miles an hour."

Section 2531 of Rem. & Bal. Codes and Statutes of Washington, provides:

> "Every person who shall drive or operate, * * * any automobile or motor vehicle * * * over any crossing, cross-walk or street intersection within the limits of any city or town, when any person is upon the same, at a rate of speed faster than one mile in fifteen minutes * * * shall be guilty of a misdemeanor."

It is undisputed that when Mr. Hunt entered East Cherry Street one of his witnesses, a Mr. Smith, was standing on the northwest corner of 27th and Cherry on the north side of the street. (Record, p. 107) Mr. Hunt himself testified that as he approached East Cherry Street he saw people on East Cherry Street; automobiles running back

and forth. (Record, p. 64) Thus it is undisputed that when Mr. Hunt entered East Cherry Street there were persons at the intersection and under the state statute it was unlawful for him to operate his automobile at a greater speed than four miles an hour across the intersection. Had Mr. Hunt been going at this speed even when he concedes he first saw the car when his automobile was still 8 feet from the track, it is needless to say that he could have stopped his automobile in time to have avoided a collision.

Even under the ordinance he was not permitted to operate his automobile across East Cherry Street at a higher rate of speed than 8 miles an hour, and at this speed he could have readily stopped his automobile before reaching the danger zone for the front end of his automobile was admittedly still some 17 or 18 feet from the track and he admits he could have stopped it at that speed within 12 feet. (Record, p. 65) Had plaintiff been obeying the law the accident would have been avoided. His negligence in failing to do so must be held as a matter of law to have contributed to the accident.

Nor is there any evidence in the record from which it could reasonably be found that the motorman could have stopped his car in time to have avoided the accident after he saw that there was danger of a collision. The motorman testified that

as soon as he saw the automobile coming he threw off his power and set the emergency immediately, which was the proper way to stop his car. (Record, p. 168) It is true that the defendant's evidence tended to show that the car was going but 15 miles an hour and the motorman testified that a car going at that speed could be stopped in 38 feet. (Record, p. 171) But it must be borne in mind that if the car was going but 15 miles an hour and the car and the automobile, as the undisputed testimony shows, reached the point of collision at about the same time (Record, pp. 74, 96, 120, 123, 169) then the street car could not have been more than twice the distance of the automobile, or about 40 feet from the point of the collision when the automobile entered East Cherry Street. If it was but 40 or 50 feet from the point of the collision when the automobile was 17 or 18 feet from the track then admittedly Mr. Hunt could have seen, and did see, the street car in time to have avoided a collision since he could admittedly stop his machine going at 8 miles an hour, in 12 feet. If the motorman could have avoided the accident, it was equally within the power of Mr. Hunt to do so. If the plaintiffs' evidence is true and the street car was going 30 miles an hour then there is absolutely no evidence in the record that the street car could have been stopped in time to have avoided a col-

lision. The motorman testified that he did not know within what distance a car going 25 miles an hour could be stopped and that he would want at least half a block in which to stop a car going at that speed. (Record, pp. 171-172)

We respectfully submit that the evidence conclusively shows that Mr. Hunt either drove his automobile across Cherry Street at an unlawful speed and at such a speed that he was unable to stop the same before reaching the track or that he failed to exercise proper care to see whether or not a car was approaching from the west as soon as he passed the building which obstructed his view. In either event he was guilty of contributory negligence barring a recovery in this action, and the motion for a directed verdict should therefore have been granted.

SPECIFICATIONS OF ERROR II AND III

Error of the Court in instructing that burden of proof was on defendant to show that unlawful speed did not cause accident.

After instructing that the law had fixed a limit upon the speed of automobiles and street cars in

certain places the court gave the following instruction:

> "And when such vehicles are operated at a speed in excess of that provision within the restricted district and an injury is occasioned thereby, then the law presumes that the injury was the result of the excessive speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence." (Record, pp. 243-244, 252)

And again, the court, after instructing that it was for the jury to determine the speed at which the car was operated and whether the collision occurred within the district in which the speed of street cars was limited to 12 miles per hour, instructed the jury further as follows:

> "If you find that it did and the car was running to exceed twelve miles per hour then it will be presumed in the first instance that the company was negligent if an injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed, and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof." (Record, pp. 244-245, 253)

By these instructions the jury were emphatically told that if they found that the street car at the time of the accident was going at a greater speed than allowed by ordinance, the burden of proof was

then cast upon the defendant to show that the injury was not the result of its negligence. This instruction was unquestionably error. It is fundamental that the burden rests on the plaintiff in personal injury actions not only to prove that the defendant was negligent but also to prove that such negligence was the proximate cause of the injury.

> "The burden rests on plaintiff not only to prove that defendant was negligent, but also that such negligence was the proximate cause of the injury."
>
> 29 Cyc. 600.

This text is supported by a multitude of authorities to which many others might be added.

> "The burden is always on the plaintiff, in an action for personal injuries, to show that the negligence charged was the proximate cause of the injury."
>
> *St. Louis & S. F. R. Co. v. Davis*, 37 Okl. 340, 132 Pac. 337.

> "This fact of causal connection between an alleged negligent act or omission and an injury can no more be presumed than can the act or omission itself. *Mo. Pac. Ry. Co. v. Porter,* 73 Tex. 307, 11 S. W. 324; *T. & N. O. Ry. Co. v. Crowder,* 63 Tex. 505."
>
> *Texas & P. Ry. Co. v. Shoemaker et al.,* 98 Tex. 451, 84 S. W. 1049;
>
> *Coffman v. R. Co.,* (Tex.) 126 S. W. 619, 620.

"It is rudimentary that negligence to be actionable must be the proximate cause of an injury, and that the burden of proof is on the plaintiff to make out such a case."

Merrill v. Southern Ry. Co. et al., 151 No. Car. 524, 66 S. E. 570;

Pryor v. Murnane, 82 Conn. 48, 72 Atl. 571, 572.

"It is not every negligent act, no matter how gross or flagrant, that can be the subject of an action, but only such negligent acts as immediately cause an injury. This is elementary."

Brewster v. Corporation of Elizabeth City, 142 N. C. 9, 54 S. E. 784.

The same rules as to the burden of proof are applicable whether the act be negligence *per se* because the same is a violation of some duty prescribed by ordinance, or negligence because it is violative of some duty arising under the general principles of law. So far as we have been able to find, there is no court which holds that a different rule applies in the one case than in the other.

"Although the violation of a statute is held to be negligence *per se* there must be a causal relation between such act and the injury to render defendant liable, and such violation must be the proximate cause of the injury. And in this respect it must appear that compliance with the ordinance would have prevented the injury."

29 Cyc. 439-440.

The following is quoted from an extensive note found in 9 L. R. A. (N. S.) at pp. 338, 345:

> "In case of a personal injury alleged to be the consequence of the neglect to obey a statute enacted for the protection of the victim, *the violation of the statute must be shown to have been the proximate cause of the injury;* otherwise no recovery can be had."

This text is supported by decisions almost without number.

> "In determining whether particular acts of negligence can be considered the proximate cause of injury, no distinction can properly be made between acts which constitute negligence because they are in conflict with statutory law and acts which are condemned as negligence under the general principles of law governing the conduct of men in relation to each other. *Whether the act be negligence per se, because violative of a statutory duty, or negligence because violative of some duty arising under general principles of law, the same rules must be applied in determining the question of proximate cause.*"
>
> *Missouri, K. & T. Ry. Co. of Texas v. Dobbins,* (Tex. Civ. App.) 40 S. W. 861.

> "It may be assumed that the cars were going at a rate of speed forbidden by the ordinance of the city, and that the rules of the company were violated in respect to signals of approach; yet it must appear, as was said in *Stebbing's Case,* 62 Md. 517, that 'the negligent breach of the duty imposed by the ordinance was the

direct and proximate cause of the injury complained of, and that such injury would not have occurred but for the violation of that duty'."

Cumberland & P. R. Co. v. State, 73 Md. 74, 20 Atl. 785.

"The element of proximate cause must be established, and will not be presumed from the fact that an ordinance or statute has been violated; and, even where the defendant rests under the imputation of negligence by reason of a violation of duty imposed by an ordinance or statute, *the negligence, no matter of what it consists, cannot create a right of action, unless it is the proximate cause of the injury complained of by the plaintiff.* Elliott, Roads & S., 1025, 1026."

Chesapeake & O. Ry. Co. v. Jennings, 89 Va. 70, 34 S. E. 986.

"It seems to us that the principle is clearly settled by this court in the cases cited that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, *he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate*—that the injury was the proximate cause, and this requirement is fundamental in the law of negligence."

* * * * * * *

"We have found no case in which the plaintiff was not required to show that his injury was the proximate consequence of the defendant's negligence."

Rich v. Asheville Electric Co., 152 No. Car. 689, 68 S. E. 232.

"It is not enough, to entitle the plaintiff to damages, to show merely that the defendant was traveling in violation of the law of the road at the time of the injury. To maintain his action the plaintiff must establish two propositions: (1) That the collision was the result of the defendant's negligence; and (2) his own inability to avoid it by the exercise of ordinary care."

Brember v. Jones, 67 N. H. 374, 30 Atl. 411.

The following is the syllabus by the court in *Massie v. Coal Company,* 41 W. Va. 620, 24 S. E. 644:

"In an action for injury resulting from the illegal negligence of the defendant, the burden of proof is on the plaintiff, and he must show that the negligence complained of was the proximate cause of the injury."

See also *Seibert v. McManus,* 104 La. 404, 29 So. 108;

Mankey v. Ry. Co., 14 So. Dak. 468, 85 N. W. 1013.

In *Browne v. Seigel-Cooper & Co.,* 90 Ill. App. 49, (Judgment affirmed, 60 N. E. 815, 191 Ill. 226), it was held that the mere failure to obey an ordinance was of itself insufficient to entitle plaintiff to recover for personal injuries, but that it must appear that such failure was the proximate cause of the injury.

There was no instruction given by the court that could possibly have had the effect of removing from

the jury's mind the erroneous rule of law embodied in the instructions complained of. (Record, pp. 237-252) An examination of the record upon the question of the liability of the defendant, as we have heretofore pointed out under Specification of Error No. I, indicates that the liability of defendant for the accident involved in this controversy is at least very doubtful.

Hunt and Bevington testified that the automobile was within 8 feet of the track when they were first able to see the care more than 100 feet away, while the testimony of the defendant's witnesses is to the effect that the car was not more than 60 feet away and in full view of Mr. Hunt before the automobile which admittedly could have been stopped in 12 feet had reached East Cherry Street. The evidence, therefore, on the issue of what was the proximate cause of the accident was closely contested. It follows that an instruction casting the burden upon defendant to prove that its negligence was not the proximate cause when the burden of proof was really upon the plaintiffs to establish that such negligence, if there was any, was the proximate cause, must necessarily have been highly prejudicial to the defendant.

We wish to quote the following from the case of *Schumacher v. Tuttle Press Co.,* 142 Wis. 631, 126 N. W. 46, 49, an action for personal injuries

where the lower court had by its instructions improperly placed the burden of proof as to proximate cause upon the defendant instead of the plaintiff:

> "The instruction being erroneous, the next inquiry is whether it appears to have affected the substantial rights of the defendant, for, unless it does so appear, the judgment is not to be reversed on that ground. Section 3072m, St. 1898 (Laws 1909, c. 192). That it does so appear we cannot doubt. *Where a question of fact is close and doubtful, as in this case, the question of which side has the burden of proof is always of great importance.* Any one who has tried a question of fact himself upon evidence nearly evenly balanced has experienced the importance of the rule, and has frequently been compelled to decide such questions on the consideration alone that he, upon whom lay the burden of proof, had not been able to lift it. *To have this burden wrongly placed on the crucial point of a close case seems unquestionably to be the deprivation of a substantial, not a mere technical, right. We therefore reluctantly conclude that this error necessitates reversal. Grenawalt v. Roe,* 136 Wis. 501, 117 N. W. 1017."

We respectfully submit that the court erred to the prejudice of defendant in instructing the jury as it did.

A word with respect to the plaintiffs' so-called request for a new trial which was filed two days after the issuance of the Writ of Error. (Record,

pp. 258-274) The order denying the request shows that the defendant objected to the granting of said request unless the plaintiffs would concede the trial court to be in error as to the matters and things set forth in defendant's Assignments of Error, and that *the plaintiffs refused to concede any error in the trial of the cause.* (Record, p. 260) It must be presumed, we submit, that the trial court would have made the same errors in his rulings and instructions had he granted a re-trial, that he made at the first trial. A new trial under such circumstances would have been of no benefit to defendant, for it would presumptively have resulted no more favorably to defendant than the first. The purpose of this appeal is to correct the errors which were prejudicial to defendant. A new trial will do defendant no good unless the errors are corrected.

We respectfully submit that the judgment of the lower court should be reversed and the action remanded to be re-tried in accordance with the law announced in Your Honors' decision.

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